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SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 582

CONTINENTAL CASUALTY COMPANY
and
FIDELITY AND CASUALTY COMPANY OF NEW YORK,
Appellants,

v.

THE ROBERTSON LUMBER COMPANY,
Appellee.

On Appeal from the Supreme Court of North Dakota.

MOTION TO DISMISS.

HAROLD D. SHAFT,
JOHN A. SHAFT,
[redacted]

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Appendix "A":

Appellants' Specifications of Error in the Supreme Court of the State of North Dakota A-1

IN THE

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v.

THE ROBERTSON LUMBER COMPANY,
Appellee.

On Appeal from the Supreme Court of North Dakota.

MOTION TO DISMISS.

Appellee, The Robertson Lumber Company, respectfully moves to Dismiss the above Appeal on the grounds that the question presented is so unsubstantial as not to need further argument, and that the federal questions raised were not timely or properly raised nor were they expressly passed on by the Supreme Court of the State of North Dakota.

FACTS.

The material facts set forth in Appellants' Jurisdictional Statement (p. 5) are substantially correct.

ARGUMENT.

1. Are the Federal Questions Substantial?

Appellee contends that the federal questions raised are not substantial in that the specific issues involved in all questions concern the Capehart Act, as amended (12 U. S. C. 1748 and 42 U. S. C. 1594). It is the understanding of Appellee that housing construction under the Capehart Act has ceased or virtually ceased throughout the United States and that this case is probably the last of a great many previous cases still before the courts. This fact is substantiated by a direct quotation from a brief submitted to the United States Supreme Court by one of the attorneys for the Appellants herein, James L. Lamb, in the year 1965. This brief was submitted in resistance to the granting of a writ of certiorari in **The United States of America for the Use and Benefit of the Robertson Lumber Company, a corporation v. Continental Casualty Company and U. S. Fire Insurance Company**, 340 F. 2d 958 (8th Cir. 1965), cert. denied, 381 U. S. 939, 14 L. Ed. 2d 702, 85 S. Ct. 1771, and the following quote is from the brief of one of the attorneys for the appellants herein:

> "Following the default of the Hal B. Hayes contracting complex which gave rise to the first Robertson case (ibid.) and several other cases, the Congress of the United States made an extensive review of the problem of construction of housing for military personnel on military bases; and the result of this review was that the Capehart program was abandoned as a method of such construction as the governmental and public interests did not appear to be best served by its continuance. As a result there are extremely few cases involving any phase of Capehart construction still pending in the courts and when these are finally determined, there should be little likelihood for fu-

ture litigation on this type of government contract bond."

In addition to the above cited case, it should be noted that this Court has denied certiorari on a similar question in at least two other instances in **Continental Casualty Co. v. Robertson Lumber Company,** 305 F. 2d 794 (8th Cir. 1962), cert. denied, 371 U. S. 922, 83 S. Ct. 290, 9 L. Ed. 2d 231, and in **United States v. Harrison and Grimshaw Construction Co.,** 305 F. 2d 363 (10th Cir. 1962), cert. denied, 371 U. S. 920, 83 S. Ct. 287, 9 L. Ed. 2d 229.

2. **Did the State Supreme Court decision deprive Appellants of their property in contravention of the Due Process Clause, Section 1, of the 14th Amendment to the Constitution of the United States?**

This question was not raised in the Supreme Court of the State of North Dakota. Appellants admit that this question was not raised in the State Supreme Court nor was it raised by a petition for rehearing (p. 8, Jurisdictional Statement). It is well settled that for this Court to review such questions, those questions must be first raised below. **Central Union Telephone Company v. City of Edwardsville,** 269 U. S. 189; **Wilson v. Cook,** 327 U. S. 474; **Bowe v. Scott,** 233 U. S. 657.

As further proof that this question was not raised in the North Dakota Supreme Court see Appendix "A" (Appellants' Specifications of Error in North Dakota Supreme Court).

3. **Did the North Dakota Supreme Court fail to give res judicata effect and full faith and credit to the final determination of the issues in the prior federal action?**

The question of res judicata was raised in the Supreme Court of North Dakota and that court decided that **Continental Casualty v. Robertson Lumber Company,** supra,

was not res judicata. The question as to whether or not it was res judicata does not raise a substantial Federal question.

In addition, the Federal Court also passed on this when an order was entered in the United States District Court for the District of North Dakota on July 17, 1963 (p. 73, Jurisdictional Statement), which order also held that the previous Robertson case was not res judicata of this matter.

The appellants at the same time raise the question of the full faith and credit clause and the Supremacy Clause of the United States Constitution. These issues were not raised in the Supreme Court of North Dakota, and, therefore, they may not be first heard in this Court. See Appendix "A" (Appellants' Specification of Errors in the North Dakota Supreme Court).

4. Does the State court have jurisdiction over the matter?

> "The District Courts shall have original jurisdiction, concurrent with State Courts, of any action on a bond executed under any law of the United States." **28 U. S. C. 1352.**

In addition, the terms of the bond itself provide that an action may be maintained in State courts (pp. 87, 88, Jurisdictional Statement).

A number of Courts have also held specifically that State courts have concurrent jurisdiction with Federal courts on Capehart Housing bonds. See **United States of America for the Use and Benefit of Miles Lumber Co. et al. v. Harrison and Grimshaw Construction Company,** 305 F. 2d 363 (10th Cir.); **Minneapolis-Honeywell Regulator Company v. Terminal Construction Corporation,** 197 A. 2d 557 (N. J.); **Allsop Lumber Company v. Continental Casualty Company,** 385 P. 2d 625, 73 N. M. 64; **United**

States v. Cedric Sanders Co., 233 F. Supp. 435 (N. Dak.); **Ireland Lumber Yard v. Progressive Contractors, et al.**, 122 N. W. 2d 554 (N. Dak.); **D&L Construction v. Triangle Electric Supply**, 332 F. 2d 1009 (8th Cir.); **B. C. Richter Contracting Co. v. Continental Casualty Co.**, 41 Cal. Rptr. 98 (1964); **Robson v. United Pacific Insurance Company**, 391 S. W. 2d 855 (Mo. 1965); **National State Bank of Newark v. Terminal Construction Corporation**, 328 F. 2d 315 (3rd Cir. 1964), affirming **National State Bank of Newark v. Terminal Construction Corporation**, 217 F. Supp. 341, at 351 (D. C. N. J. 1963); **Northwest Lumber Sales, Inc. v. S. S. Silberblatt, Inc.**, 211 F. Supp. 749 (E. D. Mo. 1962).

5. **May a state statute be applied so as to effect a change in some of the terms of a bond issued pursuant to a federal statute?**

Basically the issue here arises in that the Capehart housing bond required notice to be given to at least two different parties to the bond under its terms (p. 87, Jurisdictional Statement) while the North Dakota statute on suretyship (Sec. 22-03-06 NDCC and p. 63, Jurisdictional Statement) provided that no notice need be given unless the surety was able to show that it was prejudiced by an omission of the creditor to do anything when required by the surety which it is his duty to do. The Supreme Court of North Dakota held from the facts that there was no showing of prejudice by the surety.

Appellants contend that the construction of this statute by the Supreme Court of North Dakota was in contravention of the Supremacy Clause of the Constitution of the United States (Art. VI, Clause 2). However, this question was not raised in the Supreme Court of North Dakota and again cannot be raised for the first time in this Court. See Appendix "A" (Appellants' Specification of Errors in the Supreme Court of North Dakota).

In addition the North Dakota Supreme Court merely construed the North Dakota statute and did not decide its validity. See **Grand Gulf R. Co. v. Marshall,** 53 U. S. 165; and **Ferry v. King County,** 141 U. S. 668.

Also it should be pointed out that the North Dakota statute (Sec. 22-03-06 NDCC) was not involved in the first **Robertson** case, supra, as this case involved a Miller Act proceeding and the notice conditions under the Miller Act had been complied with.

CONCLUSION.

It is submitted that probable jurisdiction in this case should not be noted and that this Motion to Dismiss should, for the foregoing reason, be granted.

Respectfully submitted,

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Grand Forks, North Dakota 58201,
Attorneys for Appellee.

APPENDIX "A".

Appellants' Specifications of Error in the Supreme Court of North Dakota.

Specifications of Errors:

THE APPELLANTS HEREBY SPECIFY AS ERROR THE FOLLOWING:

1. That the Court erred in dismissing defendants' Continental Casualty Company's and Fidelity and Casualty Company of New York's motion to dismiss for lack of jurisdiction;

2. That the Court erred in finding against the uncontradicted testimony of a witness for the Defendants, that the failure of the Plaintiff to give the notice required by the bond to the Defendants was not prejudicial to said Defendants;

3. That the Court erred in finding that it, a State Court, had concurrent jurisdiction with Federal Courts in determining Capehart Act bond controversies;

4. That the Court erred in finding that the order of the Federal District Court in the cases of **The Robertson Lumber Company v. Wilshire Contractors, et al.**, and **The Robertson Lumber Company v. Progressive Contractors et al.**, Civil Nos. 3882 and 3883, was not res judicata of all questions involved in the instant case;

5. That the judgment of the Court was based on insufficient evidence, and was predicated on errors in law.

Dated this 25th day of April, 1967.

/s/ James L. Lamb,
For: Degnan, McElroy, Lamb & Camrud,
201 Red River National Bank Building,
Grand Forks, North Dakota 58201,
Attorneys for Appellants.